

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 29, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEFFERY D.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 1:21-CV-03143-JAG

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment.

ECF No. 11, 15. Attorney D. James Tree represents Jeffery D. (Plaintiff); Special Assistant United States Attorney Shata L. Stucky represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge by operation of Local Magistrate Judge Rule (LMJR) 2(b)(2) as no party returned a Declination of Consent Form to the Clerk's Office by the established deadline. ECF No. 17. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for an award of benefits. 42 U.S.C. § 405(g).

I. JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on April 5, 2017, alleging disability since March 15, 2017. Tr. 284, 429-42. The applications were denied initially and upon reconsideration. Tr. 308-11, 317-29. Administrative Law Judge (ALJ) Timothy Mangrum held a hearing on October 19, 2018, Tr. 150-77, and issued an unfavorable decision on January 11, 2019. Tr. 281-02. Plaintiff requested review by the Appeals Council, and in an order dated April 2, 2020 the Appeals Council vacated the hearing decision and remanded the case to the ALJ.¹ Tr. 305-06. ALJ Mangrum held a remand hearing on December 17, 2020,² Tr. 178-08, and issued another unfavorable decision March 9, 2021. Tr. 12-39. Plaintiff requested review

¹ The Appeals Council (AC) found the ALJ failed to provide a detailed assessment of the Plaintiff's mental work related abilities, stated the psychological mental consultant's opinions were partially persuasive but failed to provide rationale for finding the portion of the mental opinion limiting Plaintiff to simple three step tasks unpersuasive, requiring further evaluation of Plaintiff's mental residual functional capacity; and the decision did not evaluate Plaintiff's obesity in accordance with SSR 19-2p. Tr. 305-06. The AC remanded the case to the ALJ to evaluate the severity and possible effects of Plaintiff's obesity impairment; and to further consider the Plaintiff's maximum mental residual functional capacity, instructing the ALJ to provide rationale with specific references to evidence of record in support of assessed limitations, and in doing so to evaluate prior administrative medical findings pursuant to the provisions of the new medical rules. *Id.*

² At the 2020 hearing Plaintiff requested a closed period of disability from his alleged onset date through December 31, 2018, as he had returned to work at substantial gainful activity levels as of that date.

1 by the Appeals Council, and on September 22, 2021, the Appeals Council denied
2 the request for review. Tr. 1-6. The ALJ's March 9, 2021 decision became the
3 final decision of the Commissioner, which is appealable to the district court
4 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
5 October 27, 2021. ECF No. 1.

6 II. STANDARD OF REVIEW

7 The ALJ is responsible for determining credibility, resolving conflicts in
8 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
9 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
10 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
11 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
12 only if it is not supported by substantial evidence or if it is based on legal error.
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
14 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
15 1098. Put another way, substantial evidence is such relevant evidence as a
16 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
17 *Perales*, 402 U.S. 389, 401 (1971).

18 If the evidence is susceptible to more than one rational interpretation, the
19 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
20 1097; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).
21 If substantial evidence supports the administrative findings, or if conflicting
22 evidence supports a finding of either disability or non-disability, the ALJ's
23 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
24 Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set
25 aside if the proper legal standards were not applied in weighing the evidence and
26 making the decision. *Browner v. Sec'y of Health and Human Services*, 839 F.2d
27 432, 433 (9th Cir. 1988).
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III. SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show: (1) the claimant can make an adjustment to other work and (2) the claimant can perform other work that exists in significant numbers in the national economy. *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

IV. ADMINISTRATIVE FINDINGS

On March 9, 2021, the ALJ issued a decision finding Plaintiff was not disabled, as defined in the Social Security Act. Tr. 12-39.

At *step one*, the ALJ found Plaintiff meets the insured status requirements of the Social Security Act through December 31, 2023, and that he did not engage in substantial gainful activity (SGA) from his alleged onset date until the second quarter of 2019. Tr. 17-18. The ALJ then found that “[T]here has been a continuous 12-month period(s) during which Plaintiff did not engage in SGA and the remaining findings address the period(s) the [Plaintiff] did not engage in [SGA].” Tr. 18.

At *step two*, the ALJ determined Plaintiff had the following severe impairments: left eye blindness, residuals from hip injury, traumatic brain injury, and neurocognitive disorders, and somatic dysfunction of upper extremity. *Id.*

1 At *step three*, the ALJ found Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled the severity of one of
3 the listed impairments. Tr. 18-19.

4 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
5 he could perform light work, but with the following limitations:

6 [Plaintiff] cannot climb ladders, ropes, or scaffolds, but
7 can occasionally climb ramps and stairs. Balancing and
8 stooping are limited to frequent. [Plaintiff] can
9 occasionally kneel, crouch, or crawl. Handling bilaterally
10 is limited to frequent and overhead reaching is limited to
11 occasional. Environmental limitations include avoiding
12 concentrated exposure to hazards and excessive
13 vibrations. Visual limitations include only occasional
14 depth perception. [Plaintiff] can perform work that does
15 not require frequent written communications. [Plaintiff]
16 can perform simple work related instructions, tasks, and
decisions with a GED level of no greater than 2. [Plaintiff]
can handle few workplace changes and will be off
task/unproductive 5% of the workday due to effects of his
impairments.

17 Tr. 20.

18 At *step four*, the ALJ found Plaintiff was unable to perform any past
19 relevant work. Tr. 28.

20 At *step five*, the ALJ found that, based on the testimony of the vocational
21 expert and considering Plaintiff's age, education, work experience and residual
22 functional capacity, there were jobs that existed in significant numbers in the
23 national economy that Plaintiff could perform, including the representative
24 occupations of warehouse checker, garment sorter, production assembler, and
25 injection molding-machine tender. Tr. 30.
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1 The ALJ thus concluded Plaintiff was not under a disability within the
2 meaning of the Social Security Act at any time from the alleged onset date through
3 the date of the decision. *Id.*

4 V. ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him disability insurance benefits under Title II and Title XVI of the Social Security
7 Act. The question presented is whether substantial evidence supports the ALJ's
8 decision denying benefits and, if so, whether that decision is based on proper legal
9 standards.

10 Plaintiff raises the following issues for review: (1) whether the ALJ properly
11 evaluated Plaintiff's subjective complaints; (2) whether the ALJ properly evaluated
12 the medical opinion evidence; and (3) whether the ALJ conducted a proper step
13 five analysis. ECF No. 11 at 2.

14 VI. DISCUSSION

15 A. Subjective complaints.

16 Plaintiff contends the ALJ erred by not properly assessing Plaintiff's
17 symptom complaints. ECF No. 11 at 3-12.

18 An ALJ engages in a two-step analysis to determine whether to discount a
19 claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL
20 1119029, at *2. "First, the ALJ must determine whether there is objective medical
21 evidence of an underlying impairment which could reasonably be expected to
22 produce the pain or other symptoms alleged." *Molina v. Astrue*, 674 F.3d 1104,
23 1112 (9th Cir. 2012) (quotation marks omitted). "The claimant is not required to
24 show that [the claimant's] impairment could reasonably be expected to cause the
25 severity of the symptom [the claimant] has alleged; [the claimant] need only show
26 that it could reasonably have caused some degree of the symptom." *Vasquez v.*
27 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). Second, "[i]f the claimant meets the
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1 first test and there is no evidence of malingering, the ALJ can only reject the
 2 claimant's testimony about the severity of the symptoms if [the ALJ] gives
 3 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763
 4 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are
 5 insufficient; rather, the ALJ must identify what symptom claims are being
 6 discounted and what evidence undermines these claims. *Id.* (quoting *Lester v.*
 7 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v. Barnhart*, 278 F.3d 947, 958
 8 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why the ALJ discounted
 9 claimant's symptom claims)). "The clear and convincing [evidence] standard is
 10 the most demanding required in Social Security cases." *Garrison v. Colvin*, 759
 11 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278
 12 F.3d 920, 924 (9th Cir. 2002)).

13 Here, the ALJ concluded Plaintiff's medically determinable impairments
 14 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's
 15 statements concerning the intensity, persistence and limiting effects of those
 16 symptoms were not entirely consistent with the medical evidence and other
 17 evidence in the record. Tr. 22. Plaintiff argues the ALJ failed to provide specific,
 18 clear and convincing reasons to not fully credit Plaintiff's allegations. ECF No. 11
 19 at 3-12. Defendant argues substantial evidence supports the ALJ's assessment of
 20 Plaintiff's subjective complaints. ECF No. 15 at 3-9. The Court finds the ALJ
 21 failed to offer clear and convincing reasons for disregarding Plaintiff's subjective
 22 complaints.
 23

24 **1. Inconsistent with Objective Findings.**

25 The ALJ determined Plaintiff's allegations were inconsistent with objective
 26 findings. Tr. 22-25. An ALJ may not discredit a claimant's symptom testimony
 27 and deny benefits solely because the degree of the symptoms alleged is not
 28 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857

1 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*
2 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d 676, 680
3 (9th Cir. 2005). The objective medical evidence, however, is a relevant factor,
4 along with the medical source's information about the claimant's pain or other
5 symptoms, in determining the severity of a claimant's symptoms and their
6 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),
7 416.929(c)(2).

8 Here, the ALJ found Plaintiff's allegations were "out of proportion with the
9 workup findings," that treatment notes did not corroborate Plaintiff's allegations of
10 disabling symptoms, and that physical examinations did not support the
11 dysfunction alleged by Plaintiff. Tr. 22-23. Plaintiff contends the ALJ erred in
12 finding Plaintiff's objective physical findings insufficiently severe because the
13 ALJ: provided a selective recitation of evidence that tended to support the ALJ's
14 conclusions while ignoring relevant evidence as to Plaintiff's injuries and pain;
15 made no mention of many of Plaintiff's injuries; and improperly discounted
16 Plaintiff's reports of continued cognitive and physical impairment during the
17 period at issue because Plaintiff responded to treatment and slowly improved from
18 catastrophic injuries to the point he was able to return to work at the end of the
19 period at issue. ECF No. 11 at 4-8. Defendant contends the ALJ's findings are
20 supported by substantial evidence. ECF No. 15 at 3-9.

21 The Court finds the ALJ failed to discuss relevant evidence and records
22 showing the extent of Plaintiff's injuries, including evidence of serious physical
23 injuries such as a brain injury on the alleged onset date. For the reasons discussed
24 below the Court finds the ALJ harmfully erred as he failed to provide an accurate
25 description of Plaintiff's injuries, selectively presented evidence Plaintiff was
26 doing better without analysis or discussion of relevant evidence as to the extent of
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1 his injuries, misstated the record including hearing testimony, and generally
2 minimized Plaintiff's injuries, resulting in mischaracterization of the record.

3 The ALJ provides a brief summary of the medical evidence relating to
4 Plaintiff's accident, noting that "on the alleged onset date, [Plaintiff] was involved
5 in a serious motor vehicle accident in which he briefly lost consciousness and
6 sustained physical injuries that required significant care." Tr. 22 (citing Tr. 1171).
7 The ALJ noted "Plaintiff was hospitalized after his motor vehicle accident, after
8 suffering multiple fractures to his left hip and vision loss related to his left eye
9 laceration." Tr. 23 (citing Tr. 606-72). Later in the decision, the ALJ noted
10 "although [Plaintiff] sustained a traumatic brain injury following a motor vehicle
11 accident . . . his recovery occurred fairly quickly. Notably, he was able to follow
12 simple commands once he woke up from a brief loss of consciousness at the
13 accident site. Tr. 24 (citing Tr. 1171).

14 Descriptions of Plaintiff's accident throughout the administrative record
15 show he was involved in a high-speed collision with a semi-truck on March 15,
16 2017, requiring "prolonged extrication" from Plaintiff's vehicle, and resulting in
17 multiple traumatic injuries/polytrauma including multiple facial fractures,
18 including left orbital wall fractures and eye/nerve damage, subarachnoid
19 hemorrhage and subdural hematoma, left acetabular fracture, and cervical (C7)
20 fracture. *See, e.g.*, 1552, 1180, 1206, 1223, 1225. An ALJ must consider all of the
21 relevant evidence in the record and may not point to only those portions of the
22 records that bolster his findings. *See, e.g., Holohan v. Massanari*, 246 F.3d 1195,
23 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on some
24 entries in plaintiff's records while ignoring others).

25 The ALJ provides little information about Plaintiff's head injuries in the
26 decision, noting he "briefly lost consciousness" and concluding later in the
27 decision "[n]otably, he was able to follow simple commands once he work up from
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1 a brief loss of consciousness.” Tr. 22, 24 (citing Tr. 1171). Records show,
2 however, that while Plaintiff was initially “mentating in the field . . . he was
3 eventually intubated for decreased mentation” and that while he was initially
4 oriented, he experienced reduced level of alertness along with agitation; upon
5 neurological exam, he was found to have intercranial bleed as well as polytrauma
6 and transferred from his local hospital via to Harborview Medical Center in Seattle
7 for higher level of care. *See* Tr. 1170-71, 1195, 1206, 1222. Imaging showed head
8 injuries including a small right subdural hematoma, small left frontal subarachnoid
9 hemorrhage, left frontal parenchymal hemorrhage, left orbital fractures and left
10 frontal sinus fracture; he also had left comminuted acetabular (hip) fracture with
11 dislocation of the left femur, and cervical transverse process fracture at C7, as well
12 as a small left lung contusion. Tr. 1171. Due to the complexity of his injuries and
13 “polytrauma he require[d] critical care level medical care” and multiple services
14 were consulted including general surgery, neurosurgery, craniofacial/plastic
15 surgery, ophthalmology and orthopedic surgery. Tr. 1212-13. He was admitted to
16 the neuro intensive care unit. Tr. 1178, 1191, 1213.

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18 Records from his treating rehabilitation medicine specialist show at least
19 moderate TBI with loss of consciousness of 31 to 59 minutes, with resultant
20 cognitive and neurobehavioral dysfunction following brain injury. *See, e.g.*, Tr.
21 907-908, 1349. Notes from day nine of his hospitalization show delirium status
22 post TBI with agitation. Tr. 1309. A cognitive evaluation March 24, 2017 noted
23 Plaintiff reported a headache and feelings of confusion since “waking up” along
24 with “intermittent emotional swells” and concern about his vision; he asked, “what
25 happened to this eye?” Tr. 1312. Nursing notes show “patient has been
26 demonstrating some perseveration and short-term memory difficulties surrounding
27 recent details of his care/injury.” Tr. 1312. Records from March 24, 2017 show he
28 was alert, confused, cooperative, and perseverative. Tr. 1326. While he was able

1 to follow 1-2 step commands, and appeared oriented, he also showed “poor
2 awareness of time reference” and memory impaired executive functions. *Id.* He
3 had difficulty with awareness of errors, decreased insight into deficits, decreased
4 awareness of time, failure to grasp a main idea, decreased attention to detail, and
5 he showed delayed response time in communication. *Id.* Inpatient
6 physical/occupational therapy was indicated two to four days a week for ADL
7 training, cognitive skills development, functional mobility training, and vision
8 screen. Tr. 1327. Another nursing note March 24 indicated he became agitated
9 and required “nonviolent restraint order” during his hospitalization. Tr. 1328.

10 The ALJ also noted Plaintiff suffered vision loss “related to his left eye
11 laceration.” Tr. 23. This is an inaccurate description of Plaintiff’s injuries,
12 including skull and facial fractures which resulted in nerve damage and left eye
13 blindness; emergency ophthalmology consult upon hospital admission found an
14 optic canal fracture with bony compression of the optic nerve, with concern for
15 traumatic eye neuropathy. Tr. 1183-84. Initially, the specialist noted he could not
16 perform visual acuity exam to find out if Plaintiff was blind, as he was
17 unconscious, and decided to delay surgical repair until he was awake, noting
18 surgery could risk further nerve damage and blindness; they explained, however,
19 that based on “based on radiographic findings visual prognosis [left eye] is poor.”
20 *Id.* While the ALJ notes Plaintiff “endorsed left eye blindness” and “reported no
21 vision” or vision loss in his left eye related to a laceration, and Defendant contends
22 Plaintiff’s “activities undercut his allegations about his vision,” ECF No. 15 at 5,
23 records show he is blind in his left eye due to his injuries, including left wall
24 orbital fracture and nerve damage including optic nerve with “left 3rd, 4th and 6th
25 cranial nerve injuries.” *See, e.g.,* Tr. 1183-84, 1428-29.

27 Plastic surgery consults upon hospitalization indicated they were consulted
28 due to craniofacial fractures, particularly numerous fractures of his left skull and

1 orbit. Tr. 1228. They noted Plaintiff was intubated and on a ventilator, and
2 observed a large laceration with exposed muscle and bone involving his left brow,
3 upper lid, and lateral orbit. Tr. 1227. They noted ophthalmology had decided
4 against immediate surgery as it was too risky, but that he would “still require an
5 operation for his skull and facial fractures” and that this was anticipated “in the
6 next 1-2 weeks as swelling abates.” Tr. 1228. They repaired a facial laceration at
7 that time, however, noting “extensive laceration through his left brow and lateral
8 orbit” with recommended IV antibiotics for open fracture, head of bed elevation,
9 washing out the wound at that time in the ER, sinus precautions, and “[cerebral
10 spinal fluid] leak watch.” Tr. 1228.

11 Repeat CT imaging of Plaintiff’s brain showed stability of intracranial
12 bleeding, and neurosurgery decided against operative intervention at that time.
13 Tr. 1153. His C7 transverse fracture was also noted to be stable and did not
14 require acute intervention. Tr. 1213. Imaging showed left acetabular dislocation
15 and fractures with associated hematoma, and orthopedic surgery attempted bedside
16 reduction of Plaintiff’s hip dislocation without success; he was placed in traction at
17 that time pending surgical repair. *Id.* Plaintiff underwent open reduction internal
18 fixation (ORIF) of his left posterior wall acetabular fracture on March 16, 2017.
19 Tr. 1310, 1317. He also underwent ORIF of the left orbit, frontal sinus
20 reconstruction with mesh placement, and complex repair of forehead and eyelid
21 laceration on March 23, 2017. Tr. 1315, 1317, 1341, 1348. Records show blood
22 transfusion for anemia and acute blood loss. Tr. 1309.

24 Plaintiff alleges inability to work due to pain and cognitive issues status post
25 serious injuries sustained in an accident on his alleged onset date. In finding
26 Plaintiff’s allegations “out of proportion with workup findings,” the ALJ did not
27 discuss many of his injuries and cited minimal and peripheral findings from
28 Plaintiff’s extensive injuries, hospitalization, and rehabilitation in March and April

1 2017. Tr. 22. The ALJ noted one imaging study related to his head and brain
2 injuries in support of his finding Plaintiff's allegations were out of proportion to
3 objective evidence, noting "for example, a CT angiogram does not show
4 convincing evidence of traumatic vascular injury." *Id.* (citing Tr. 1183). Records
5 show, however, that this was one of numerous imaging studies performed upon
6 hospitalization, including CT scans of his head and brain, which showed
7 intracranial hemorrhages related to his skull fractures, and that CT angiogram was
8 done more than once to rule out traumatic aneurysm/worsening bleed. *See, e.g.*,
9 Tr. 1291-92. The ALJ does not mention any of the other imaging, the fact that his
10 traumatic brain injury included skull fractures and intracranial bleeding, his
11 multiple facial/cranial fractures and subsequent surgical repair, or the weeks of
12 hospitalization and inpatient rehabilitation for polytrauma, which is referenced in
13 detail throughout the records; and followed by prolonged outpatient physical
14 rehabilitation. Tr. 21-24; *see, e.g.*, Tr. 1105, 905, 1414.

15 Additionally, the ALJ misstates portions of the record, resulting in further
16 minimization of Plaintiff's injuries. For example, the ALJ found that "at the 2018
17 hearing [Plaintiff] testified that at the time of his alleged onset disability he was
18 involved in a motor vehicle accident and spent a week in the hospital." Tr. 21.
19 This is incorrect. In fact, at the 2018 hearing the ALJ discussed with Plaintiff the
20 fact Plaintiff was "transported to Harborview Hospital over in Seattle, and you
21 were there for about three weeks." Tr. 155. Plaintiff also testified he did not
22 remember anything about his hospitalization until "after about a week of being
23 there," and records show post traumatic amnesia estimated at seven days due to his
24 injuries. Tr. 156; *see, e.g.*, Tr. 1089. While the ALJ's decision notes Plaintiff's
25 hip fractures, finding that Plaintiff had "injured his hips and had to use crutches for
26 about 3 months and endorsed left eye blindness," medical records, along with
27 Plaintiff's testimony, show that Plaintiff then required a cane for another three
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1 months to assist with standing and walking as he recovered from hip fractures and
2 dislocation with ORIF repair, with subsequent months of intensive physical
3 therapy to assist in weightbearing, range of motion, strength, normalizing gait and
4 body mechanics. *See, e.g.*, Tr. 157, 918, 1294, 1366.

5 Although the ALJ addressed Plaintiff's hip injury in the decision, the ALJ
6 failed to discuss objective evidence of the extent of all the injuries for which
7 Plaintiff is alleging disability. In focusing on findings unrelated to Plaintiff's
8 injuries and failing to discuss the extent of his injuries, the ALJ's characterization
9 of the medical record is not supported by substantial evidence. The ALJ noted
10 Plaintiff "noted some hip stiffness after sitting for a while just a couple of months
11 after his injury, in May 2017, but indicated that his pain had progressively
12 improved." Tr. 23 (citing Tr. 869). The orthopedic records the ALJ cites here,
13 however, also indicate that Plaintiff was applying or disability "due to his multiple
14 injuries and ability to return to work." Tr. 869. Objective findings upon physical
15 exam included reduced strength and range of motion in his hip; the orthopedist
16 noted he was still only weightbearing as tolerated and instructed him to work on
17 balance and strength. Tr. 870. The ALJ also found that Plaintiff had "good range
18 of motion except for some limited left hip range, with full strength, and normal
19 posture." Tr. 23 (citing Tr. 907). However, at the same visit in July 2017, Plaintiff
20 reported he could only walk for three to four minutes before needing to take a
21 break due to left hip pain. Tr. 906. The ALJ then concludes "it was noted he was
22 doing well from a surgical standpoint with a good range of motion . . . and from an
23 orthopedic standpoint was healed." Tr. 23 (citing Tr. 1447). This reference,
24 however, is taken is from a much later April 2019 appointment with orthopedic
25 surgery, which is after Plaintiff's requested period of disability; at that time his
26 surgeon noted he was two years status post ORIF and also explained "of note, he
27 sustained a significant traumatic brain injury . . . and is followed by rehabilitation
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1 medicine. They have cleared him to work 4 hours a day, 20-pound weightbearing
2 instruction.” Tr. 1446-47.

3 An ALJ must consider all of the relevant evidence in the record and may not
4 point to only those portions of the records that bolster his findings. *See, e.g.,*
5 *Holohan*, 246 F.3d at 1207-08 (9th Cir. 2001). Here, the ALJ selectively cited
6 portions of the record showing milder findings while failing to discuss evidence of
7 continuing pain, difficulty sitting and standing for long periods, and persistent
8 cognitive issues throughout the period at issue. The ALJ’s incomplete and highly
9 selective summary of medical evidence, misstatement of the record, and
10 conclusory statements fail to meet the burden of “setting out a detailed and
11 thorough summary of the facts and conflicting clinical evidence, stating his
12 interpretation thereof, and making findings.” *Trevizo v. Berryhill*, 871 F.3d 644,
13 675 (9th Cir. 2017) (internal citations omitted). In citing portions of the record that
14 show milder examination findings while the longitudinal record shows more mixed
15 results, the ALJ’s characterization of the record is not supported by substantial
16 evidence.

17 The ALJ’s conclusion that Plaintiff’s symptom testimony is not consistent
18 with objective medical evidence is therefore not supported by substantial evidence
19 and this is not a clear and convincing reason to discount Plaintiff’s symptom
20 claims.
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22 **2. Inconsistent Statements/Discrepancies.**

23 The ALJ found Plaintiff’s statements were inconsistent with the longitudinal
24 evidence and that other discrepancies in the record detracted from the reliability of
25 Plaintiff’s self-report. Tr. 23, 25. An ALJ may consider inconsistent statements by
26 a claimant in assessing his subjective statements. *Tonapetyan v. Halter*, 242 F.3d
27 1144, 1148 (9th Cir. 2001). Here, ALJ found Plaintiff’s reports of pain
28 inconsistent with the evidence, finding, for example, that “Plaintiff was

1 hospitalized after his motor vehicle accident, after suffering multiple fractures to
2 his left hip and vision loss related to his left eye laceration,” but “just a month after
3 the incident, the [Plaintiff] said that the severity of his left hip pain was at only a 4
4 on a pain scale of 10 and “he told providers his hip was feeling ok.” Tr. 23 (citing
5 Tr. 611, 620). In terms of his hip injury, records from this visit with physical
6 therapy also show Plaintiff was unable to ambulate without crutches at that time,
7 required assistance with stretching exercises from his wife, had very limited range
8 of motion in his hip, and the physical therapist noted “signs and symptoms
9 consistent with TBI with polytrauma and recent left hip ORIF.” Tr. 611-12, 620.
10 The ALJ noted while [Plaintiff] reported no vision in his left eye, he acknowledged
11 reduced swelling and increased movement.” Tr. 23. As discussed *supra*, the
12 ALJ’s characterization of Plaintiff’s vision loss and head injury is insufficient, as
13 Plaintiff suffered injuries including intracranial bleeding, facial and skull fractures,
14 and his left eye injury(s) included left optic canal fracture with bony compression
15 of the optic nerve and cranial nerve damage resulting in left eye blindness. *See*
16 *e.g.*, Tr. 1178, 1180, 1183.

17 The ALJ also pointed to a November 2017 appointment where Plaintiff
18 reported that he was able to walk about half a mile before noticing some left hip
19 soreness, along with one line from a January 2018 physical therapy report showing
20 Plaintiff reported he had been “doing some jogging without pain and was feeling
21 good,” concluding that “records around that time and since indicate that he was
22 increasing his functioning overall with improved lower extremity strength and
23 range of motion.” Tr. 23 (citing Tr. 980,³ 1044). Physical therapy notes, however,
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27 ³ This page cited to is A. Ford, Psy.D’s September 2017 Memory Assessment and
28 Psychological Diagnostic Report and does not contain this information. It appears

1 indicate Plaintiff performed numerous supervised therapeutic exercises, along with
2 home exercise program, in order to improve his left hip range of motion without
3 impingement and to improve his strength; and that as of December 2017, he had
4 attended 37 physical therapy appointments and was approved for more at that time,
5 as his therapist noted his goals were not yet met and he required additional therapy
6 “in attempts to regain full left hip ROM and strength to maximize his function s/p
7 traumatic injury and surgical repair of his left hip.” Tr. 1026-27.

8 While the ALJ focuses on one report by a physical therapy assistant that
9 Plaintiff reported some jogging, citing it more than once, it is not clear where
10 Plaintiff performed this activity or for how long, and objective findings from the
11 same visit include evidence that he continued to have reduced strength in his left
12 lower extremity. Tr. 1044-45. At the next physical therapy visit, February 1,
13 2018, he reported getting up from the floor continued to be difficult due to hip
14 pain, and that “putting on his left shoe is still difficult.” *Id.* While Plaintiff self-
15 reported he would have “a little difficulty” running on uneven or even ground in
16 March 2018, he also reported he continued to have “quite a bit of difficulty”
17 getting in and out of the bath, putting on shoes and socks, and “moderate
18 difficulty” with hobbies and recreational activities, his ability to roll over in bed,
19 and in his ability to stand or sit for one hour. Tr. 1049. Records from a visit with
20 his treating medical rehabilitation specialist, Dr. Joon, in January 2018 show he
21 continued to have issues with pain sitting or standing for more than 15 minutes and
22 that while he had improvement in range of motion he was not yet back to baseline.
23 Tr. 1088. Plaintiff’s participation in physical therapy or home exercise program is
24 not inconsistent with his symptom claims.
25

26
27 the ALJ was referencing the November 2017 physical therapy report at AR 21F/1,
28 which is at Tr. 1023.

1 The ALJ also discounted Plaintiff's December 2018 report of stabbing
2 shoulder pain because his pain was mild at the time of the appointment. Tr. 24
3 (citing Tr. 1419). Notably, Plaintiff alleged his disability ended that month, and
4 records also show his report that this pain had been "occurring . . . since March
5 2017 accident"; records from a visit a month earlier, in November 2018, reveal his
6 provider explained his pain would flare up, was "currently not flared [only] 4/10
7 pain – last flare was a couple weeks ago (when initially made the appointment)." Tr.
8 1421. The ALJ selectively cited to records that tended to support his
9 conclusions, while the longitudinal record showed more mixed findings, including
10 reports of pain that interfered with Plaintiff's attempts to return to work. The
11 ALJ's conclusion that Plaintiff's statements about pain were inconsistent with the
12 longitudinal evidence is not supported by substantial evidence.

13 The ALJ also concluded that "other discrepancies in the record detracted
14 from the reliability of Plaintiff's self-report," and the ALJ discounted Plaintiff's
15 symptom reports in part because Plaintiff "has repeatedly expressed a desire to
16 return to his prior work as a truck driver, rather than engage in any significant
17 efforts to look for other work." Tr. 25. The ALJ noted Plaintiff "returned to an
18 employer for light duty, but the employer did not have much light work for him
19 and he stopped work." *Id.* The ALJ also noted Plaintiff was able to pass his
20 personal driver's test and returned to other work, at Habitat for Humanity, by 2020.
21 *Id.*

22 Plaintiff contends the ALJ improperly discredited Plaintiff for a strong work
23 ethic and desire to return to his profession. ECF No. 11 at 11. Defendant does not
24 defend this finding. ECF No. 15 at 7-9. The ALJ also did not take Plaintiff's
25 testimony into consideration, finding only that Plaintiff's employer did not have
26 much light duty work for him, so Plaintiff stopped working. Tr. 25. Plaintiff
27 testified, however, that he attempted several lighter jobs with his former employer,
28

1 including cleaning and organizing toolboxes; and that while he was only released
2 to four hour shifts at first, he was taking up to 10 small breaks during the four
3 hours to stretch, sit, or stand, and had difficulty completing a four-hour shift due to
4 pain. Tr. 160-62. The ALJ also discounted Plaintiff's report that lifting and heavy
5 activity caused him pain, concluding "yet he was still weed eating despite any
6 aggravations." Tr. 25 (citing Tr. 1408, 1552, 1564). In 2018, however, Plaintiff
7 testified that when his former employer gave him such work, his back hurt after
8 about 15 minutes and he had to leave work early. Tr. 161. The ALJ also cited to
9 records closer to and after his requested closed period of disability. Tr. 25.
10 Records from physical therapy in January 2019, for example, show he reported he
11 tried to return to work as a mechanic late in 2018 but "then they had him weed
12 eating," and that he was still having difficulty at that time working due to pain.
13 Tr. 1408. The ALJ cites records from August 2018, showing significant
14 myofascial pain and carpal tunnel syndrome "likely aggravated by activities such
15 as weed eating," but at the same visit the provider also noted Plaintiff was "not
16 currently working," his pain was rated 5 of 10, "but it can be higher," and the
17 provider noted that any "sitting, standing or bending or shoulder rotating can make
18 the symptoms worse." Tr. 1552. In November 2018, Dr. Joon noted his attempts
19 to return to work, but also that he had "increased shoulder pain and back pain" and
20 that his employer gave him work including "weed-eater activity . . . [that] caused
21 significant pain shortly after he returned to work, and "he had to stop working
22 [after] about a month" at that time. Tr. 1564. Notably, he was still restricted to
23 part-time work with breaks as needed at that time due to pain and cognitive deficit.
24 *See, e.g.*, Tr. 1559.

26 Additionally, in 2020 Plaintiff testified that even when he found lighter work
27 with Habitat for Humanity, he was still only able to work part time with
28 accommodations, including a supervisor that stayed with him throughout the day.

1 Tr. 193. He testified he still took frequent breaks due to pain, still forgot things
2 even though he had worked there for a year, and that he frequently shifted position
3 from sitting to standing as needed. Tr. 193-95.

4 The ALJ's conclusion Plaintiff's desire to return to work and attempts to
5 find lighter work with a former employer during the period at issue detracted from
6 the reliability of his self-report is not supported by substantial evidence. This was
7 also not a clear and convincing reason to discount Plaintiff's symptom reports.

8 **3. Activities.**

9 A claimant's daily activities may support an adverse credibility finding if the
10 claimant's activities contradict his other testimony. *Orn v. Astrue*, 495 F.3d 625,
11 639 (9th Cir. 2007). If a claimant can spend a substantial part of the day engaged
12 in pursuits involving the performance of exertional or non-exertional functions, the
13 ALJ may find these activities inconsistent with the reported disabling symptoms.
14 *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113. "While a claimant need not
15 vegetate in a dark room in order to be eligible for benefits, the ALJ may discount a
16 claimant's symptom claims when the claimant reports participation in everyday
17 activities indicating capacities that are transferable to a work setting" or when
18 activities "contradict claims of a totally debilitating impairment." *Molina*, 674
19 F.3d at 1112-13.

20 Here, the ALJ pointed to Plaintiff's general ability to pay bills, perform daily
21 activities, and do chores without assistance, and his ability to go out into the
22 community, care for his children, drive, exercise, and attend appointments as
23 inconsistent with his allegations. Tr. 22-25. The ALJ also found by January 2018,
24 Plaintiff "asserted he was doing well at home, able to do all of his activities of
25 daily living, and able to handle medical appointments without difficulty." Tr. 23
26 (citing Tr. 1019). None of these activities are inconsistent with Plaintiff's
27 allegations of chronic pain and other symptoms preventing him from working a
28

1 full-time job during the period at issue. The Ninth Circuit has repeatedly found
2 that the ability to perform these kinds of activities is not inconsistent with the
3 inability to work:

4 We have repeatedly warned that ALJs must be especially
5 cautious in concluding that daily activities are inconsistent
6 with testimony about pain, because impairments that
7 would unquestionably preclude work and all the pressures
8 of a workplace environment will often be consistent with
9 doing more than merely resting in bed all day.

10 *Garrison*, 759 F.3d at 1016.

11 Further, while the ALJ found his ability to care for his children, including
12 the ability to lift—but not carry—his young child, inconsistent with his allegations,
13 the Court finds no inconsistency. Further, if such care activities are to serve as a
14 basis for the ALJ to discredit the Plaintiff’s symptom claims, the record must
15 identify the nature, scope, and duration of the care involved and this care must be
16 “hands on” rather than a “one-off” care activity. *Trevizo*, 871 F.3d at 675-76. The
17 ALJ’s conclusion that Plaintiff’s activities were inconsistent with his symptom
18 claims is not supported by substantial evidence.

19 **4. Limited Treatment/Improvement with Treatment.**

20 The ALJ found that Plaintiff’s treatment did not support the level of
21 impairment he alleged and that he improved with treatment. Tr. 23. Evidence of
22 conservative treatment is sufficient to discount a claimant’s testimony regarding
23 the severity of an impairment. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th
24 Cir. 2008) (holding the ALJ permissibly inferred that the claimant’s “pain was not
25 as all-disabling as he reported in light of the fact that he did not seek an aggressive
26 treatment program” and “responded favorably to conservative treatment including
27 physical therapy and the use of anti-inflammatory medication, a transcutaneous
28 electrical nerve stimulation unit, and a lumbosacral corset”). Additionally, the

1 effectiveness of treatment is a relevant factor in determining the severity of a
2 claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.913(c)(3); *see Warre v.*
3 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006); *Tommasetti*,
4 533 F.3d at 1040 (a favorable response to treatment can undermine a claimant's
5 complaints of debilitating pain or other severe limitations).

6 Here, the ALJ found Plaintiff's treatment did not support the level of
7 limitation he alleged. Tr. 23. As discussed *supra*, however, the ALJ failed to
8 adequately discuss the extent of Plaintiff's injuries and treatment in the decision.
9 The ALJ also found improvement, noting Plaintiff participated in physical therapy
10 that showed that he was able to tolerate progressively increased exercises with
11 observable improvement. *Id.* (citing Tr. 1023-64). The ALJ noted "sitting and
12 standing was noted to cause pain when prolonged, but his hip range of motion was
13 improved to full range of motion except for hip flexion which was only minimally
14 impaired." *Id.* (citing Tr. 1018). However, at that time (January 2018) his
15 providers also noted sitting and standing for more than 15 minutes caused pain,
16 and he was referred for a neuropsychological evaluation due to persistent cognitive
17 deficit. Tr. 1029. In February 2018, Dr. Joon explained that due to "severe
18 traumatic brain injury with multiple intracranial hemorrhages, skull fractures, and
19 left eye blindness as well as left hip fracture," he has "a resultant cognitive deficit
20 as well as difficulty walking and doing daily activities." Tr. 1021. She noted at
21 that time he had not been able to work "due to persistent deficits," but that he "may
22 be able to return to light duty work or part-time work and then gradually increase
23 his work hours to full time in next six months." *Id.*

24 Plaintiff contends that he did improve, as expected, from catastrophic
25 injuries with treatment, but he remained unable to work at SGA levels during the
26 period at issue. ECF No. 11 at 8. As of June 2018, Dr. Joon explained Plaintiff
27 was still limited to part time light work, noting his condition was permanent but
28

1 “the degree of severity continues to improve and may change in 6-12 months;” and
2 in August 2018, Dr. Joon released him to work with accommodations including
3 part-time hours and as needed breaks. Tr. 1110-11, 1559. As of April 2019, after
4 Plaintiff returned to SGA level work, Dr. Joon explained that Plaintiff “has made
5 significant gain [and] will likely have some improvement. However, he will have
6 permanent residual pain and cognitive deficit as well as left eye blindness.”
7 Tr. 1429.

8 The ALJ’s conclusion that Plaintiff’s treatment did not support the level of
9 impairment he alleged and that he improved with treatment to the point he was
10 able to work during the period at issue is not supported by substantial evidence.
11 Along with the errors discussed above, overall, the ALJ failed to provide clear and
12 convincing reasons, supported by substantial evidence, to reject Plaintiff’s
13 symptom allegations.

14 **B. Medical Opinions.**

15 Plaintiff alleges the ALJ erred by not properly assessing the medical
16 opinions. ECF No. 11 at 12-20.

17 For claims filed on or after March 27, 2017, pursuant to the applicable
18 regulations, the ALJ does not give any specific evidentiary weight to medical
19 opinions or prior administrative medical findings. 20 C.F.R. §§ 404.1520c(a),
20 416.920c(a). Instead, the ALJ must consider and evaluate the persuasiveness of all
21 medical opinions or prior administrative medical findings from medical sources. 20
22 C.F.R. §§ 404.1520c(a) and (b), 416.920c(a) and (b).

23 The factors for evaluating the persuasiveness of medical opinions and prior
24 administrative findings include supportability, consistency, the source’s
25 relationship with the claimant, any specialization of the source, and other factors
26 (such as the source’s familiarity with other evidence in the file or an understanding
27 of Social Security’s disability program). 20 C.F.R. §§ 404.1520c(c)(1)-(5),
28

1 416.920c(c)(1)-(5). Supportability and consistency are the most important factors,
2 and the ALJ must explain how both factors were considered. 20 C.F.R.

3 §§ 404.1520c(b)(2), 416.920c(b)(2). The ALJ may explain how the ALJ
4 considered the other factors, but is not required to do so, except in cases where two
5 or more opinions are equally well-supported and consistent with the record. *Id.*
6 Supportability and consistency are explained in the regulations:

7 (1) *Supportability*. The more relevant the objective medical evidence
8 and supporting explanations presented by a medical source are to
9 support his or her medical opinion(s) or prior administrative medical
10 finding(s), the more persuasive the medical opinions or prior
11 administrative medical finding(s) will be.

12 (2) *Consistency*. The more consistent a medical opinion(s) or prior
13 administrative medical finding(s) is with the evidence from other
14 medical sources and nonmedical sources in the claim, the more
15 persuasive the medical opinion(s) or prior administrative medical
16 finding(s) will be.

17 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2).

18 The Ninth Circuit has addressed the issue of whether the new regulatory
19 framework displaces the longstanding case law requiring an ALJ to provide
20 specific and legitimate reasons to reject an examining provider's opinion. *Woods*
21 *v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). The Court held that the new
22 regulations eliminate any hierarchy of medical opinions, and the specific and
23 legitimate standard no longer applies. *Id.* at 788-89, 792. The Court reasoned the
24 "relationship factors" remain relevant under the new regulations, and thus the ALJ
25 can still consider the length and purpose of the treatment relationship, the
26 frequency of examinations, the kinds and extent of examinations that the medical
27 source has performed or ordered from specialists, and whether the medical source
28 has examined the claimant or merely reviewed the claimant's records. *Id.* at 790,
792. Even under the new regulations, an ALJ must provide an explanation

1 supported by substantial evidence when rejecting an examining or treating doctor's
2 opinion as unsupported or inconsistent. *Id.* at 792.

3 **1. Dr. Koukol and Dr. Davenport.**

4 In October 2017, the state agency physical consultant, Dr. Koukol, reviewed
5 Plaintiff's records and rendered an opinion of Plaintiff's level of functioning.
6 Tr. 219-22. Dr. Koukol opined Plaintiff could occasionally lift and carry 20
7 pounds, frequently lift and carry 10 pounds, and could stand and walk for a total of
8 four hours in an eight-hour workday and sit about six hours in an eight-hour
9 workday; he could occasionally climb ramps and stairs, and occasionally kneel,
10 crouch, and crawl; he could never climb ladders, ropes, or scaffolds, but he could
11 frequently balance and stoop. Tr. 220. Dr. Koukol explained exertional limitations
12 were due to left hip fracture and vision loss. *Id.* In terms of visual limitations, Dr.
13 Koukol opined on the left Plaintiff had limited near acuity, far acuity, depth
14 perception, accommodation, color vision, and field of vision due to left eye vision
15 loss. Tr. 221. He opined Plaintiff should avoid concentrated exposure to wetness
16 and vibration, fumes, dusts, gases, poor ventilation, and hazards. Tr. 221-22. He
17 noted environmental limitations were due to history of TBI with subdural
18 hemorrhage, left eye vision loss, and left hip fracture. Tr. 222. In January 2018,
19 Dr. Davenport affirmed Dr. Koukol's opinion. Tr. 255-57. The ALJ found the
20 opinions of the state agency consultants persuasive.
21

22 The ALJ found that the limitation to four hours standing and walking was
23 supported by records of Plaintiff's hip injury following his accident, noting
24 "greater restriction consistent with complaints of pain with prolonged sitting,
25 standing, and walking." Tr. 25. The ALJ also found "DDS did not provide
26 specific assessment of left eye visual limitations, despite significant vision loss, the
27 claimant had adequate vision to drive and do daily activities." *Id.* Plaintiff
28 contends the ALJ erred because he failed to address the factors of consistency and

1 supportability as required by the regulations, and also failed to provide any
2 explanation for not putting relevant portions of the state agency opinions into the
3 RFC, including the limitation to four hours of standing and walking and additional
4 visual limitations; Plaintiff contends that such limitations eliminate at least one of
5 the jobs at step five. ECF No. 11 at 17-18.

6 The Court finds the ALJ failed to adequately address the factors of
7 supportability and consistency in assessing the state agency opinion.
8 Supportability and consistency are the most important factors an ALJ must
9 consider when determining how persuasive a medical opinion is, and therefore the
10 ALJ is required to explain how both factors were considered. 20 C.F.R.

11 §§ 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence and
12 supporting explanations that support a medical opinion, and the more consistent an
13 opinion is with the evidence from other sources, the more persuasive the medical
14 opinion is. 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ
15 provided almost no analysis of the opinions, and the analysis he did provide
16 explains the limitation to four hours standing and walking is persuasive because it
17 is “supported by records of [Plaintiff’s] hip injury following his accident.” Tr. 25.
18 Despite finding the limitation to standing and walking four hours in an eight-hour
19 day supported, however, the ALJ failed to explain why he did not include this
20 limitation in the RFC.
21

22 Along with errors discussed *supra*, in relation to Plaintiff’s subjective
23 complaints, the ALJ also failed to adequately discuss the factors required by the
24 regulations in assessing medical opinion evidence, and also failed to account for a
25 limitation he found persuasive in the RFC. Notably, this case was previously
26 remanded by the Appeals Council in part because the ALJ failed to evaluate prior
27 administrative medical findings pursuant to the provisions of the new medical
28 rules. *See* Tr. 305-06.

1 **2. Dr. Joon.**

2 Cherry Joon, MD, provided multiple reports with her opinion on Plaintiff's
3 level of functioning. In a letter dated August 8, 2017, Dr. Joon reported she was
4 Plaintiff's rehabilitation medicine provider for "polytrauma sustained on March 15,
5 2017." Tr. 957. Dr Joon explained "his injuries include severe traumatic brain
6 injury with multiple intracranial hemorrhages and skull fracture and left eye
7 blindness," and she noted he also "follows up with other physicians for his left
8 acetabulum fracture and other injuries." *Id.* She opined "he has resultant difficulty
9 with cognitive function, walking, and daily activities. He has not been able to
10 work since his injury." *Id.* She opined "I anticipate that he may be able to return
11 to light duty work part-time and gradually increase his hours to full-time in next 6-
12 12 months." *Id.*

13 In August 2017, Dr. Joon completed a physical functional evaluation on
14 behalf of Washington State DSHS and rendered an opinion on Plaintiff's level of
15 functioning. Tr. 1105-07. She explained Plaintiff had a "traumatic brain injury
16 with multiple hemorrhages and skull fracture leading to cognitive impairment,
17 balance impairment, left eye vision loss due to [left] orbital wall fracture and nerve
18 (optic) injury," along with "left acetabular fracture requiring surgical correction,
19 leading to difficulty with walking." Tr. 1105. She explained his treatment
20 included hospitalization from March 15, 2017 through April 6, 2017 and that he
21 "required multiple surgeries and inpatient rehabilitation for [his] injuries." *Id.*
22 Dr. Joon opined Plaintiff "should be given breaks (scheduled and as needed) for
23 his cognitive impairment" and that "he is unable to go up ladders or go up on
24 heights due to balance impairment" and that "his left eye vision loss is permanent
25 and should be given accommodation." Tr. 1106. She opined he has "left hip
26 weakness persistent from fracture with limited [range of motion]." *Id.* She opined
27 he has marked limitation, defined as "very significant interference with the ability
28

1 to perform one or more work related activities,” in his ability to sit, stand, walk,
2 lift, carry, stoop and crouch due to left hip/acetabulum fracture. *Id.* She opined he
3 had moderate limitation, defined as “significant interference with the ability to
4 perform one or more basic work activities,” in his ability to see due to left orbital
5 wall fracture and optic nerve injury, and moderate limitation in his ability to
6 communicate due to TBI. *Id.* She opined he was capable of performing sedentary
7 work, defined as able to lift 10 pounds maximum, frequently lift and carry
8 lightweight articles, and walk or stand only for brief periods” and that these work
9 limitations would persist with treatment for 6-12 months. Tr. 1107.

10 Again, in a letter dated February 7, 2018, Dr. Joon reported she was
11 Plaintiff’s rehabilitation medicine provider for “polytrauma sustained on 3/15/2017
12 from a motor vehicle collision . . . he sustained severe traumatic brain injury with
13 multiple intracranial hemorrhages, skull fractures, and left eye blindness as well as
14 left hip fracture.” Tr. 1021. She explained he had “a resultant cognitive deficit as
15 well as difficulty walking and doing daily activities. He has not been able to work
16 since injury due to persistent deficits.” *Id.* She noted he continued to improve
17 with current therapy and “I anticipate that he may be able to return to light duty
18 work or part-time work and then gradually increase his work hours to full time in
19 [the] next six months.” *Id.*

20 On June 29, 2018, Dr. Joon completed a documentation form for medical or
21 disability condition on behalf of Washington State DSHS and rendered an opinion
22 on Plaintiff’s level of functioning. Tr. 1110-12. She opined his condition limited
23 his ability to work, look for work or prepare for work, and that he was limited in
24 his ability to “stand or sit for long periods of time. Walk for long period [of] time.
25 Bend over, crawl, or go up/down on ladder[s]”; she explained he “[h]as cognitive
26 deficit leading to slowed processing speed and decreased attention as well as
27 memory, leading to limitations in ability to recall instruction, advocating for
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1 himself, answer questions quickly, needs repeated direction.” Tr. 1110. She
2 indicated he could perform light work but that he should be limited to 11-20 hours
3 of participation a week, noting his “hours may be increased as he tolerates.”
4 Tr. 1110-11. She opined his condition was permanent but the “degree of severity
5 continues to improve and may change in 6-12 months.” Tr. 1111.

6 In August 2018, Dr. Joon and Barbara Beach, Plaintiff’s rehabilitation
7 counselor, submitted a letter to Plaintiff’s employer. Tr. 1114, 1559; *see* Tr. 563.
8 Dr. Joon noted Plaintiff had been under her care since his accident March 15, 2017,
9 and that “following his injury he continues to have difficulty sitting, standing and
10 walking, bending over or crawling for long periods of time or going up and down
11 ladders due to his hip injury.” Tr. 1114. She opined he could lift 20 pounds and
12 carry 10 pounds “at this time.” *Id.* She noted he underwent cognitive testing and
13 based on the results “we expect that: [h]e will be able to learn and comprehend
14 new tasks. He will be able to track/remember tasks (using a notebook as backup
15 memory system as needed) and communicate in a work setting.” *Id.* She opined
16 that “if is expected he could profit from training but would do best with hands-on,
17 small group training rather than book work/classroom setting.” *Id.* Dr. Joon
18 opined “in regard to the specific job of driving trucks, exercise of caution would be
19 recommended; certainly though re-evaluation of truck driving skills is indicated.”
20 And that “if he is cleared, shorter runs, possibly initially with a coworker along,
21 would be recommended.” *Id.* She noted he was able to pass an evaluation through
22 DOL for his regular license. *Id.* Dr. Joon explained “at this time, I am releasing
23 him to return to work” with “the following accommodation to ensure a safe
24 return,” and recommended “he start at 4 hours per day for 2-3 weeks and then
25 gradually increase his work hours, 1-2 hours per day every two weeks as he
26 tolerates” and “he should only drive within your local area rather than driving to
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1 Seattle as he did in the past” and “he should also take scheduled and as needed
2 breaks.” *Id.*

3 In November 2018, Dr. Joon completed a Documentation Request Form on
4 behalf of DSHS. Tr. 1560-62. She opined Plaintiff was restricted to 11-20 hours a
5 week of sedentary work. Tr. 1560-61.

6 In April 2019, Dr. Joon completed a medical report form on Plaintiff’s
7 behalf. Tr. 1428-29. She reported she treated Plaintiff July 20, 2017 through
8 November 2019. Tr. 1428. She reported relevant clinical findings included:
9 “fractures and bleeding demonstrated on multiple imaging studies (CT head, x-ray
10 C-spine, pelvis, shoulder). Neuropsychological evaluation in March 18 with
11 slowed processing speed and deficit with complex attention.” *Id.* She opined
12 Plaintiff should lie down during day “intermittently when his back pain or hip pain
13 flares up” explaining, “[m]ost of the time, he does not have to lie down. When it
14 flares, can be down 30 min or longer.” *Id.* She noted he “underwent multiple
15 surgeries for his fractures (acetabular, left orbital wall); underwent [occupational
16 therapy] and speech therapy. Also requires PT still but at decreased frequency.
17 Prior to outpatient therapy, he underwent acute inpatient rehabilitation.” *Id.* She
18 indicated his conditions were still likely to cause pain, explaining “[h]e has had
19 multiple fractures that required surgery. He gets intermittent flare up of his pain
20 depending on physical activities, most with repetitive motion.” *Id.* She explained
21 that “[h]e has made significant gain. He will likely . . . have some improvement.
22 However, he will have permanent residual pain and cognitive deficit as well as left
23 eye blindness.” Tr. 1429. She noted at that time work would not cause him to
24 deteriorate, although she opined that “a position will need to be not physical in
25 order for it to not cause any deterioration.” *Id.* She opined at that time that
26 Plaintiff would likely miss up to 4 days of work a month, clarifying that
27 “depending on [his] pain level, he may need to take time off for repeat therapies, 1-
28

1 2 times per week for 6-8 weeks. If pain does not flare up, he will not need to miss
2 more than 1-2 days a month or less.” *Id.*

3 The ALJ found Dr. Joon’s opinions partially persuasive. Tr. 26-27. Plaintiff
4 contends Dr. Joon’s opinions limiting Plaintiff to part-time work with breaks as
5 needed and missing work are consistent with disability and the ALJ failed to
6 provide legally sufficient reasons for rejecting them. ECF No 11 at 13-17.

7 As the case is being remanded for immediate benefits on other grounds, the
8 Court takes notice of the multiple reports of Dr. Joon detailing the extent of
9 Plaintiff’s injuries, along with her repeat restriction to part-time work with breaks
10 as needed during the period at issue, but declines to otherwise address these
11 opinions.

12 **3. Other Opinions.**

13 Plaintiff also challenged the ALJ’s analysis of other medical opinions. ECF
14 No. 11 at 18-20. As the case is being remanded for immediate benefits, the Court
15 declines to address the other medical opinions.

16 **C. Step Five Findings.**

17 Plaintiff contends the ALJ failed to meet his step five burden. ECF No. 11
18 at 20-21. As the case is being remanded for immediate benefits on other grounds,
19 the Court also declines to address this issue.

20 **D. Remedy.**

21 Plaintiff urges this Court to remand for an immediate award of benefits.
22 ECF No. 11 at 12. “The decision whether to remand a case for additional
23 evidence, or simply to award benefits is within the discretion of the court.”
24 *Sprague*, 812 F.2d at 1232 (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
25 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
26 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
27 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the
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1 proper course, except in rare circumstances, is to remand to the agency for
2 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
3 775 F.3d 1090, 1099 (9th Cir. 2014). The Ninth Circuit, however, has “stated or
4 implied that it would be an abuse of discretion for a district court not to remand for
5 an award of benefits” when three conditions are met. *Garrison*, 759 F.3d at 1020
6 (citations omitted). Under the credit-as-true rule, where: (1) the record has been
7 fully developed and further administrative proceedings would serve no useful
8 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
9 evidence, whether claimant testimony or medical opinion; and (3) if the improperly
10 discredited evidence were credited as true, the ALJ would be required to find the
11 claimant disabled on remand, the Court will remand for an award of benefits.
12 *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three
13 prongs have been satisfied, the Court will not remand for immediate payment of
14 benefits if “the record as a whole creates serious doubt that a claimant is, in fact,
15 disabled.” *Garrison*, 759 F.3d at 1021.

16 Here, the Court finds that each of the credit-as-true factors is satisfied and
17 that remand for the calculation and award of benefits for the requested closed
18 period of disability is warranted. As to the first element, the record has been fully
19 developed during the period at issue and there is no indication further proceedings
20 would serve any purpose. Administrative proceedings are generally useful where
21 the record “has [not] been fully developed,” *Garrison*, 759 F.3d at 1020, or there is
22 a need to resolve conflicts and ambiguities, *Andrews*, 53 F.3d at 1039.

24 Additionally, Plaintiff has requested a closed period of disability, from
25 March 15, 2017 through December 31, 2018, and the record is fully developed
26 during the requested period. Given the case has already been remanded once by
27 the Appeals Council and given the ALJ’s failure to properly consider the evidence
28 of record on two occasions, the Court declines to provide the Administration

1 another chance to improperly deny the claim. The Court finds the record is fully
2 developed during the period at issue, March 15, 2017 through December 31, 2018,
3 and further proceedings would not serve a useful purpose.

4 As discussed *supra*, the ALJ also failed to provide legally sufficient reasons,
5 supported by substantial evidence, to reject Plaintiff's testimony/symptom claims.
6 Therefore, the second prong of the credit-as-true rule is met. The third prong of
7 the credit-as-true rule is satisfied because if Plaintiff's statements were credited as
8 true, the ALJ would be required to find Plaintiff disabled for the entire relevant
9 period, which in this case is a requested closed period of disability from March 15,
10 2017 through December 31, 2018.

11 Finally, the record as a whole does not leave serious doubt as to whether
12 Plaintiff is disabled during the period at issue. *See Garrison*, 759 F.3d at 1021. As
13 discussed *supra*, there is evidence of brain injury with residual cognitive deficit,
14 which the ALJ failed to adequately discuss, along with residuals of polytrauma
15 from a serious accident on Plaintiff's alleged onset date, including pain and
16 difficulty standing, walking, and sitting.

17 The Court notes that the credit-as-true rule is a "prophylactic measure"
18 designed to motivate the Commissioner to ensure that the record will be carefully
19 assessed and to justify "equitable concerns" about the length of time which has
20 elapsed since a claimant has filed their application. *Treichler*, 775 F.3d at 1100
21 (internal citations omitted). Here, Plaintiff was seriously injured, has a young
22 family, made significant efforts at rehabilitation and succeeded in a return to work
23 at SGA levels, and he has waited over five years for benefits. Considering the
24 delay from the date of the application, harmful error by the ALJ, including failure
25 to discuss relevant evidence supporting disability along with some misconstrual of
26 evidence in support of nondisability, all described *supra*, it is appropriate in this
27
28

1 case for this Court to use its discretion and apply the “credit as true” doctrine
2 pursuant to Ninth Circuit precedent.

3 **VII. CONCLUSION**

4 The ALJ’s decision is not supported by substantial evidence and not free of
5 harmful legal error.

6 Accordingly, **IT IS ORDERED:**

7 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 11**, is
8 **GRANTED.**

9 2. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is
10 **DENIED.**

11 3. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff
12 **REVERSING and REMANDING the matter to the Commissioner of Social**
13 **Security for immediate calculation and award of benefits.**

14 4. The District Court Executive is directed to file this Order and provide
15 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for
16 Plaintiff and the file shall be **CLOSED.**

17 **IT IS SO ORDERED.**

18 DATED September 29, 2023.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE